HARRY REID
NEVADA

DEMOCRATIC LEADER

482

United States Senate

WASHINGTON, DC 20510–7020

June 14, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Wheeler:

I appreciate your effort to expand consumers' choice of set-top boxes by improving competition in video navigation systems through your proposal to "unlock the set-top box." I am concerned that your proposal does not contain mechanisms to ensure that third-party set-top box providers will be required to adequately protect programming content or consumer privacy. I urge you to give careful consideration to these possible consequences and ensure that they are resolved before proceeding with your proposal.

Programmers do not rely on copyright laws alone to protect their content. Rather, the complex licensing and contractual arrangements they negotiate are the means through which they exercise their legal copyright protections. As drafted, the FCC's proposal would not extend these licensing or contractual arrangements to third-party box providers, and it is unclear what, if any, duty such providers would have to protect programming content or otherwise comply with the licensing agreements. It also is unclear whether programmers would have any ability to enforce these agreements directly with the third-party providers. As a result, programmers may be forced to rely primarily on costly and lengthy litigation to protect their content. As we have seen in other contexts, relying on litigation as a sole remedy for copyright infringement creates an environment where piracy may flourish and the ensuing damage cannot be undone.

Moreover, it has become increasingly clear that for third-party box providers, the real value is not in producing or selling the box but in the data that the box will collect. Consumers will be handing over a significant amount of information about their viewing habits and, as the television interface is used more expansively, about themselves. While the FCC has jurisdiction to regulate how multichannel video programming distributors (MVPDs) use the consumer data they collect, the FCC has no similar jurisdiction over third-party box providers. As a result, a consumer using a third-party set-top box could have minimal recourse to ensure the strong privacy protections that the FCC currently obligates for MVPDs, leaving the FCC in the position of mandating privacy protections that it has no jurisdiction to enforce and leaving consumers without any meaningful remedy.

As you continue to pursue greater competition in the set-top box marketplace, I ask you to closely review the impact of this proposal on all affected parties and resolve these issues as you move forward.

Thank you for your attention to this matter.

Sincerely,

HARRY REID
Democratic Leader
United States Senate

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable Harry Reid
United States Senate
522 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Reid:

Thank you very much for your letter sharing your views about how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact the legal rights of copyright owners and creators and the privacy protections afforded to pay-TV consumers. I take your input on these issues seriously and assure you that it will receive careful consideration.

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, $231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.[1] With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.[2] Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

You shared your views about how this proceeding might affect the legal rights of programmers. The FCC's authority to regulate communications has always existed alongside

---

[1] U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY, 17 (Jun. 23, 2016).

[2] One recent analysis found that the cost of cable set-top boxes has risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

content owners' rights to control the duplication, distribution, or performance of their works. Starting with broadcast, and continuing with cable, satellite and the internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements.

I also share your interest in ensuring that we do not interfere with the licensing agreements and contractual arrangements between pay-TV providers and programmers. Licensing agreements in particular are used to establish usage terms for content that falls outside of the protections afforded by federal copyright law. I believe that such provisions should remain protected, and we are actively seeking input from the programming community on a number of methods to accomplish this.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe that we can foster competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the Writers Guild of America, West (WGAW), who concluded the following in one of its filings in this proceeding: "[t]he proposed rules for a competitive navigation device market are a logical

and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content."[3]

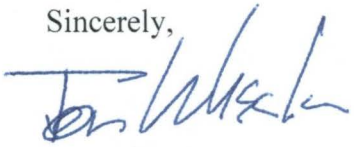
I also share your goal of ensuring that the privacy protections that exist today will also apply to alternative navigation devices and applications. Pay-TV providers abide by privacy obligations under Sections 631 and 338 of the Communications Act. These privacy obligations, among other things, prohibit pay-TV providers from disclosing personally identifiable information concerning any subscriber, including data about a subscriber's viewing habits, without the subscriber's prior consent.

I strongly believe that third-party app developers and device manufacturers must afford consumers the same level of protection as afforded by pay-TV providers. While the NPRM proposes that competitive devices and apps certify compliance with the privacy protections in the Act, we also invited parties to provide alternative proposals that would ensure the preservation of these important privacy protections.

We will continue to engage with stakeholders on this important issue. Notably, our record includes filings on this issue from the Federal Trade Commission (FTC) and a group of state attorneys general (state AGs)—representing the states of California, Illinois, New York, Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, Oregon, Pennsylvania, Vermont, and the District of Columbia. In their comments, the FTC and the state AGs explain that—if we require competitive devices and apps to publicly commit to providing the same privacy protections required of pay-TV providers under the Communications Act—the FTC and the state AGs would be willing and able to enforce the privacy commitments made by third party app and device manufacturers just as they currently enforce other privacy commitments made by apps and devices. I am confident that by working with stakeholders and our federal and state partners, we will identify clear rules of the road that will afford consumers with strong privacy protections and the enforcement mechanisms necessary to ensure compliance by third parties.

The record we are developing will help us preserve strong copyright and privacy protections while delivering American consumers meaningful choice. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,



Tom Wheeler

---

[3] Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).